FILE COPY

No. 263

In the Supreme Court of the United States

OCTOBER TERM, 1944

FIDELITY-PHILADELPHIA TRUST COMPANY AND ROBERT A. WORKMAN, EXECUTORS OF THE ESTATE OF ANNA C. STINSON, DECEASED, PETITIONERS

v.

WALTER J. ROTHENSIES, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statute and Regulations Involved	2
Statement	2
Argument	5
Conclusion	11
Appendix	12

CITATIONS

Cases:

Burnet v. *Northern Trust Co.*, 283 U. S. 782	8
Commissioner v. *Kellogg*, 119 F. 2d 54	9
Commissioner v. *McCormick*, 43 F. 2d 277	9
Field v. *Commissioner*, decided July 13, 1944	11
Hassett v. *Welch*, 303 U. S. 303	5, 8
Helvering v. *Hallock*, 309 U. S. 106	5, 6, 7, 10
Helvering v. *Proctor*, 140 F. 2d 87	8
Klein v. *United States*, 283 U. S. 231	5, 6
May v. *Heiner*, 281 U. S. 238	8
McCormick v. *Burnet*, 283 U. S. 784	8
Smith v. *Shaughnessy*, 318 U. S. 176	9

Statute:

Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 302	5, 7, 12

Miscellaneous:

Treasury Regulations 80 (1937 Ed.), Art. 17	10, 13

605442—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 263

FIDELITY-PHILADELPHIA TRUST COMPANY AND ROBERT A. WORKMAN, EXECUTORS OF THE ESTATE OF ANNA C. STINSON, DECEASED, PETITIONERS

v.

WALTER J. ROTHENSIES, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R. 68a–79a) and that of the Circuit Court of Appeals (R. 82–87) are unreported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 15, 1944 (R. 87). The petition

for a writ of certiorari was filed on July 17, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a transfer in trust made by the decedent on March 26, 1928, in which she reserved a contingent power to appoint the corpus by will, was intended to take effect in possession or enjoyment at or after death, within the meaning of Section 302 (c) of the Revenue Act of 1926.

2. If so, whether the entire value of the corpus of the trust at the time of decedent's death should be included in the decedent's gross estate.

STATUTE AND REGULATIONS INVOLVED

The relevant provisions of the statute and regulations involved are set forth in the Appendix, *infra.*

STATEMENT

The pertinent facts found by the District Court (R. 68a–72a) may be summarized as follows:

The decedent, Anna C. Stinson, of Bryn Mawr, Pennsylvania, died November 17, 1934, at the age of 51. She was survived by her two daughters. On March 26, 1928, the decedent transferred certain property in trust, the value of which at the time of her death was $84,443.49 (R. 68a). The

material provisions of the deed of the trust were to the following effect:

The income of the trust was to be paid to the settlor during her life and at her death to her daughters, aged 12 and 10 respectively at the time the trust was created, in equal shares during their respective lives. At the death of each daughter, the corpus or principal supporting her share of the income was to be paid to her descendants, *per stirpes.* In the event of the decease of either daughter without leaving descendants surviving, the corpus or principal of such daughter's share was to be added to the share of the other daughter, if then living, or of her then surviving descendants, *per stirpes.* In the event of the death of both daughters of the settlor without leaving descendants surviving, the corpus or principal of the trust estate was to be paid to such person or persons and upon such estate or estates as the settlor by her last will and testament directed, or, in default of such appointment, to certain designated charitable institutions, share and share alike (R. 69a–70a).

By will executed June 6, 1930, the decedent exercised the power vested in her by the trust deed and appointed the income from the property to her four brothers and sisters during their respective lives, share and share alike, in the event that at the time of the decease of the last survivor of her daughters there should be no descendants of

either then living; and, upon the decease of any brother or sister, the decedent appointed the corpus providing the income of such sister or brother to certain named charities, differing somewhat from those named in the deed of trust (R. 71a–72a).

Since the decedent's death, there have been born to her two daughters three children who were living at the time of the decision below (R. 72a).

The trust was testamentary in character and was intended as a substitute for a testamentary disposition in that it was intended to take effect in possession or enjoyment after the death of the decedent (R. 72a).

The executors of the decedent's estate did not include the value of the corpus of the trust in the decedent's gross estate (R. 68a). The Commissioner determined that the net value of the property comprising the trust should be included in the decedent's gross estate in accordance with the provisions of Section 302 (c) of the Revenue Act of 1926, as amended by Section 803 of the Revenue Act of 1932. (R. 23a). The deficiency which the Commissioner determined as a result of including the trust was $13,442.90 (R. 69a). This amount was paid and a claim for refund was filed.

The District Court sustained the Commissioner's denial of the refund under the statute as originally enacted (R. 73a–79a). The Circuit Court of Appeals affirmed the judgment of the District Court (R. 82–87).

ARGUMENT

1. The Circuit Court of Appeals properly decided that the transfer made by the decedent was one intended to take effect in possession or enjoyment at or after death within the meaning of Section 302 (c) of the Revenue Act of 1926 (Appendix, *infra*) prior to the amendments of 1931 and 1932.[1]

Since the decedent, in addition to creating a life estate for herself, reserved the contingent right to appoint the corpus by will in the event that her two daughters died without leaving descendants, the decision here is governed by *Helvering* v. *Hallock,* 309 U. S. 106.

This case differs in two respects from the *Hallock* situations. Neither difference is of importance. In each of the cases decided in *Helvering* v. *Hallock* the grantor created an initial life interest in another person; here the grantor reserved the initial life estate for herself. There is nothing in the opinion in that case or in *Klein* v. *United States,* 283 U. S. 231, on the authority of which the *Hallock* decision rests, attaching any significance to the person in whom the initial life interest reposed. The reservation in each case of a possible reversionary interest in the grantor was the vital factor which brought the statute

[1] Since the transfer here was made in 1928, it is unaffected by either amendment. See *Hassett* v. *Welch,* 303 U. S. 303.

into operation and taxed the transfer at the grantor's death.

The other point of dissimilarity is that here there was reserved a contingent power to appoint by will, while in the *Klein* and *Hallock* cases the grantor had the contingent power to reacquire complete ownership during his lifetime. This difference, too, is not material. In the *Klein* case the grantor reserved a fee simple interest to himself in the event he outlived the life tenant. In the cases decided in *Helvering* v. *Hallock*, the reversionary interests of the grantors in the *Hallock* and *Huston* transfers were almost identical with that of the grantor in the *Klein* case. However, in the *Bryant* transfer the grantor and the life tenant had the joint power to modify, alter, or revoke the trust; upon the death of either, the survivor had the sole power to do so. In the event that the life tenant died before him, the grantor was to receive the income for life and at his death the principal was to be paid to his estate if the trust had not been modified or revoked. The reservation to the grantor in the *Bryant* case was properly considered, for the purpose of the taxing statute, as being indistinguishable from the reservations involved in the other cases.

In the *Bryant* case the grantor could have reacquired complete ownership if he had outlived the life tenant and had revoked the trust. In

the other cases the grantor would have been vested with complete ownership upon the happening of the contingency. Here the grantor had a life interest and the power to make a testamentary disposition effective on the happening of the contingency. If Section 302 (c) were being relied on in this case to tax the interest which the grantor retained for her own enjoyment, it might be important to discuss the relative economic importance of a life estate which is coupled with dispositive power at death, and a life estate with dispositive power during life. But that is not what is being taxed. What is being taxed is a transfer made during decedent's lifetime which left succeeding interests uncertainly defined until her death, since, if the contingency happened before her death, all succeeding interests might pass under her will and those interests would then derive in possession and enjoyment from her death rather than from the transfer in trust. Section 302 (c) is therefore applicable.

Petitioners seem to argue (Br. 21–22) that the application of the *Hallock* case depends upon the degree of probability that the contingency may occur. It is submitted that this Court did not, in removing from consideration the "niceties of the art of conveyancing" and "elusive and subtle casuistries" of the law of property,[2] erect in their stead the laws of probability as a basis for de-

[2] *Helvering* v. *Hallock*, 309 U. S. 106, 117, 118.

termining taxability. Moreover, it may be observed that the contingency here is in some respects less remote than that in the *Bryant* case, in which the life beneficiary had the power, after the death of the grantor, to prevent the corpus from reverting to the grantor's estate.

Neither *May* v. *Heiner*, 281 U. S. 238, *Burnet v. Northern Trust Co.*, 283 U. S. 782, nor *Hassett* v. *Welch*, 303 U. S. 303, cited by the petitioners (Br. 8–9), is contrary to the decision in the present case. In each of those cases it was held that, in transfers occurring prior to March 3, 1931 (the date on which Section 302 (c) was amended in the manner shown in the Appendix, *infra*) the reservation of a life estate, without more, did not cause the remainder to be taxable as a transfer taking effect at the death of the grantor. In the present case, it is not the death of the grantor as life tenant which is significant, but the extinction by her death of the reserved power of testamentary disposition. *Helvering* v. *Proctor*, 140 F. 2d 87 (C. C. A. 2d) (Pet. Br. 17–18) is likewise inapplicable, since in both of the cases there decided the only reservation to the grantor was a life interest. Those cases were indistinguishable from *May* v. *Heiner* and were decided on the authority of that case.

McCormick v. *Burnet*, 283 U. S. 784, also cited by petitioners (Br. 8), must be considered to have been overruled by the *Hallock* case since in both, in contrast to the other cases cited, the

grantor reserved not only a life estate but a contingent reversionary interest.[3]

The decision of the Circuit Court of Appeals in this case is not at variance with its decision in *Commissioner* v. *Kellogg,* 119 F. 2d 54 (C. C. A. 3d). There, the settlor provided (p. 56) that the estate should revert to his next of kin "in the shares provided by the laws of New Jersey" in the event that the beneficiaries failed to take. The court, in holding that the transfer was not taxable at death, pointed out that the same reversionary interest would have taken effect upon the termination of the trust even if the trust instrument had remained silent. Such is not the situation in the present case.

The gift tax cases (Pet. Br. 18–22) add nothing to petitioner's contentions. This Court has pointed out in *Smith* v. *Shaughnessy,* 318 U. S. 176, 179, that the estate and gift tax statutes are not mutually exclusive or completely integrated. An interest not taxed by the latter, or too highly contingent to diminish the value of accompanying interests for gift tax purposes, may be a significant factor in determining liability to the estate tax.

2. The petitioners claim that even if Section 302 (c) is applicable, it was error to tax the value, determined as of decedent's death, of the

[3] The provisions of the trust are set forth in the opinion of the Circuit Court of Appeals, *Commissioner* v. *McCormick,* 43 F. 2d 277 (C. C. A. 7th), Footnote 1.

entire corpus. It is asserted that the value of the life estates of the daughters must be excluded (Pet. Br. 23–28). The meaning of the *Hallock* case and the Treasury Regulations, cited by petitioner, has been misconceived.

As previously pointed out, the *Hallock* case differs from the present one since there the grantor created the initial life estate in another person. While that difference is not important in determining whether anything is taxable at the grantor's death, it is material in determining what is to be taxed. The initial life estate in the *Hallock* case, which began in enjoyment at the time of the transfer and continued after the settlor's death, was neither enlarged nor diminished by the death of the settlor. Therefore it was properly excluded from the taxable estate; for the death of the settlor was not its generating source.

Since the initial life estate was in the grantor in this case, there was no life interest outstanding at the time of her death. All succeeding interests took effect at that time. Those interests, accordingly, were properly included in the measure of the property taxable at her death.

As the court below made clear (R. 85–86), Article 17 of Treasury Regulations 80 (1937 edition) (Appendix, *infra*) contains nothing in conflict with the manner in which the tax was determined in the present case. The regulation was

promulgated to reflect the *Hallock* decision. It does so accurately.

Field v. *Commissioner* (C. C. A. 2d), decided July 13, 1944 (1944 P–H, par. 62,664), appears to be in conflict with the decision below upon the second issue presented. We believe, however, that the *Field* case was decided incorrectly and that the decision in the present case is correct. The Government at present intends to petition for a writ of certiorari in the *Field* case. The apparent conflict in decisions would warrant this Court in granting the writ of certiorari in this case to review the second question.

CONCLUSION

The decision of the Circuit Court of Appeals upon both questions presented is correct. There is no conflict in decisions with respect to the first question, but there is a conflict concerning the second question. If the Court determines that the writ should be granted, it is respectfully suggested that review be limited to the second question.

Charles Fahy,
Solicitor General.

Samuel O. Clark, Jr.,
Assistant Attorney General.

Sewall Key,
Robert N. Anderson,
Hilbert P. Zarky,
Special Assistants to the Attorney General.

August 1944.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302 [as amended by Section 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680]. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—

*   *   *   *   *

(c) [as amended by the Act of March 3, 1931, c. 454, 46 Stat. 1516, and by Section 803 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169]. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full con-

sideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning this title.[1]

* * * * *

Treasury Regulation 80 (1937 Ed.):

ART. 17 [as amended by T. D. 5008, 1940-2 Cum. Bull. 286, 287]. *Transfers conditioned upon survivorship.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer by the decedent prior to his death (other than a bona fide sale for an adequate and full consideration in money or money's worth) whereby and to the extent that the beneficial title to the property transferred (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), is not to pass from the decedent to the donee unless the decedent dies before the donee or another person, or its passing is otherwise conditioned upon decedent's death; or, if title passed to the donee, it is to be defeated and the property is to revert to the decedent as his own should he survive the donee or another person, or the reverting of the property to the decedent is conditioned upon some other contingency terminable by his death. Since

[1] The italicized portion represents the amendment made by the Act of March 3, 1931, as amended by Section 803 of the Revenue Act of 1932.

in such transfers the decedent's death is requisite to a termination of his interest in the property, it is unimportant whether his interest be denominated a reversion or a possibility of reverter, whether it arose by implication of law or by the express terms of the instrument of transfer, and whether the interest of the donee be contingent or vested subject to be divested, and the tax will apply, unless otherwise provided in the next succeeding paragraph, without regard to the time when the transfer was made, whether before or after the enactment of the Revenue Act of 1916. Thus, upon a transfer by a decedent of property in which an estate for life is given to one and an estate in remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remainder, if the life estate is then outstanding. The value of the outstanding life estate is not to be included in determining the value of the gross estate, unless that estate had been transferred in contemplation of the decedent's death, or otherwise as to render it a part of the gross estate. If by reason of an election by the executor the valuation of the gross estate is governed by the provisions of article 11, adjustments in the value of such transferred estates may be required. (See article 15.)

Where the transfer was made during the period between November 11, 1935 (that being the date upon which the Supreme Court of the United States rendered its

decisions in the cases of *Helvering* v. *St. Louis Union Trust Co.* (296 U. S. 39 [Ct. D. 1047, C. B. XIV-2, 339 (1935)]) and *Becker* v. *St. Louis Union Trust Co.* (296 U. S. 48 [Ct. D. 1046, C. B. XIV-2, 337 (1935)]) and January 29, 1940 (that being the date upon which such Court rendered its decisions in *Helvering* v. *Hallock* and companion cases (309 U. S., 106 [Ct. D. 1440, C. B. 1940-1, 223]), and the Commissioner, whose determination therein shall be conclusive, determines that such transfer is classifiable with the transfers involved in such two cases decided on November 11, 1935, rather than with the transfer involved in the case of *Klein* v. *United States* (283 U. S., 231 [Ct. D. 333, C. B. X-1, 462 (1931)]), previously decided by such Court, then the property so transferred shall not be included in the decedent's gross estate under the provisions of this article, if the following condition is also met: Such transfer shall have been finally treated for all gift tax purposes, both as to the calendar year of such transfer and subsequent calendar years, as a gift in an amount measured by the value of the property undiminished by reason of a provision in the instrument of transfer by which the property, in whole or in part, is to revert to the decedent should he survive the donee or another person, or the reverting thereof is conditioned upon some other contingency terminable by decedent's death.

U. S. GOVERNMENT PRINTING OFFICE: 1944